

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN L. AMMONS,) Case No. EDCV 06-0973 PJW
Plaintiff,)
v.) MEMORANDUM OPINION AND ORDER
MICHAEL J. ASTRUE,)
Commissioner of the)
Social Security Administration,)
Defendant.)

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying his application for disability insurance benefits. Plaintiff contends that the Agency erred when it failed to properly consider the treating physician's opinion of disability and when it determined at step two that Plaintiff did not have a severe impairment. For the reasons set forth below, the Agency's decision is affirmed.

In Plaintiff's first claim for relief, he alleges that the Administrative Law Judge ("ALJ") erred when he rejected the opinion of Plaintiff's treating physician, Dr. Floyd Andersen, that Plaintiff was disabled as a result of chronic fatigue syndrome ("CFS") and

1 fibromyalgia.¹ (Joint Stipulation at 3.) There is no merit to this
2 claim.

3 Plaintiff was treated by Dr. Andersen from September 2000 to July
4 2001.² (Administrative Record ("AR") 113-19.) In a progress report
5 dated October 9, 2000, Dr. Andersen noted that Plaintiff complained of
6 a "sudden onset of fatigue," and that the left side of his face felt
7 numb. (AR 119.) Dr. Andersen also noted that Plaintiff complained of
8 memory deterioration, unrefreshed sleep, and was depressed at not
9 being able to work. (AR 119.) Dr. Andersen's impression was that
10 Plaintiff was suffering from an "exacerbation" of CFS and he
11 prescribed Plaintiff medication. (AR 119.) On October 30, 2000, Dr.
12 Andersen noted that Plaintiff's medication was helping, that his
13 fatigue was "improving," and that his vision was clearer. (AR 118.)
14 On February 6, 2001, Dr. Andersen noted that Plaintiff's CFS was
15 improving, that his joint pains were better, and that his muscle pain
16 was "slight[ly] better," but also noted that Plaintiff's fatigue was
17 "only slight[ly] better." (AR 116.) Plaintiff was directed to
18 continue exercising "as tolerated." (AR 116.) On April 25, 2001, Dr.
19 Andersen noted that Plaintiff was "still fatigued," but that the "B12
20 [was] helping some," as were the antibiotics. (AR 115.) On May 30,
21 2001, Dr. Andersen noted that Plaintiff's energy was increased,
22 allowing him to do light workouts, and that his fatigue was much
23 better. (AR 113.) Dr. Andersen also noted that Plaintiff could

24
25 ¹ Dr. Andersen's last name is incorrectly spelled "Anderson"
26 throughout the Joint Stipulation and ALJ's decision. The Court
27 follows the spelling used by Dr. Andersen in his letter of August 5,
28 2004. (AR 148.)

² Plaintiff returned to see Dr. Andersen in October and November
2002 to treat a sore throat. (AR 110-11.)

1 return to work "soon in 1-3 months" if he continued to improve. (AR
2 113.) On July 30, 2001, Dr. Andersen noted that Plaintiff's CFS was
3 improving, that his strength was improving, and that he was losing
4 weight. (AR 113.)

5 In May 2004, Plaintiff applied for benefits. In June 2004, the
6 Agency denied his claim by letter, informing him:

7 You said you were unable to work because of chronic fatigue
8 syndrome and fibromyalgia. In order to be eligible for the
9 Disabled Individual disability programs, you must be found
10 disabled on or before 06/30/01, the date you last met the
11 earnings requirements for disability benefits. The medical
12 evidence in [the] file is insufficient to establish how your
13 condition affected your ability to perform work activities as of
14 that date. Consequently, you are found not to have been under a
15 disability as of 06/30/01.

16 (AR 46.)

17 In the wake of the Agency's denial of his claim, Plaintiff, who
18 was representing himself up to that point, obtained counsel on August
19 4, 2004. (AR 52.) The following day, on August 5, 2004, Plaintiff
20 went back to see Dr. Andersen. (AR 111-12.) Dr. Anderson examined
21 Plaintiff and discovered that Plaintiff exhibited 14 of 18 tender
22 points, indicating fibromyalgia. (AR 112.) Dr. Andersen then
23 prepared a letter for Plaintiff, stating that Plaintiff had been
24 unable to work from 1998 to July 2000, had been able to work from July
25 2000 to October 2000, and has been "100% disabled since October 2000."
26 (AR 148.)

27 On August 18, 2004, Plaintiff moved for reconsideration of the
28 Agency's denial of his claim for benefits. (AR 53.) The Agency again

1 denied his claim. (AR 54.) Plaintiff then sought reconsideration by
2 an Administrative Law Judge ("ALJ"), which request was granted.

3 The ALJ held a hearing, in which Plaintiff appeared with counsel
4 and testified. (AR 148A-165.) Thereafter, the ALJ issued a decision,
5 denying Plaintiff's claim for disability insurance benefits. (AR 10-
6 15.) The ALJ rejected Dr. Andersen's view that Plaintiff was totally
7 disabled since October 2000. (AR 13.) He pointed out that Dr.
8 Andersen did not provide appropriate laboratory findings or a
9 comprehensive rationale to support his opinion. (AR 13.) He also
10 noted that Dr. Andersen never concluded in 2000 and 2001, when he was
11 seeing Plaintiff on a regular basis, that Plaintiff was totally
12 disabled, rather, Dr. Andersen was noting at that time that
13 Plaintiff's condition was improving. (AR 13-14.) Finally, the ALJ
14 emphasized the fact that Dr. Andersen never attempted to rule out
15 other causes for Plaintiff's ailments before concluding that Plaintiff
16 had chronic fatigue syndrome and fibromyalgia, which is required under
17 social security rulings. (AR 14.)

18 In order to uphold the ALJ's rejection of Dr. Andersen's opinion
19 of disability--which was contradicted by consulting examiner Chang's
20 opinion of non-disability--the Court must find that the ALJ set forth
21 specific and legitimate reasons for rejecting it. *Lester v. Chater*,
22 81 F.3d 821, 830 (9th Cir. 1995). The Court so finds here.

23 Social Security Ruling ("SSR") 99-2p sets forth the appropriate
24 standard for evaluating cases involving CFS. According to that
25 ruling, "CFS constitutes a medically determinable impairment when it
26 is accompanied by medical signs or laboratory findings." SSR 99-2p at
27 *1. Such signs include "the presence of clinically evaluated,
28 persistent or relapsing chronic fatigue that is of new or definite

1 onset . . . cannot be explained by another physical or mental
2 disorder, [and] is not the result of ongoing exertion." *Id.*
3 Furthermore, at least four recognized symptoms must have "persisted or
4 recurred during six or more consecutive months of illness and must not
5 have pre-dated the fatigue."³ *Id.* at *1-2. "In accordance with
6 criteria established by the [Centers for Disease Control and
7 Prevention], a physician should make a diagnosis of CFS 'only after
8 alternative medical and psychiatric causes of chronic fatiguing
9 illness have been excluded.'" *Id.* at *1.

10 The ALJ's rejection of Dr. Andersen's August 2004 opinion that
11 Plaintiff was totally disabled as of October 2000 is supported by a
12 number of specific and legitimate reasons. First, the ALJ noted that
13 Dr. Andersen had failed to provide laboratory findings to support his
14 finding that Plaintiff suffered from fibromyalgia. (AR 13.) The only
15 objective signs in Dr. Andersen's notes were the tender points noted
16 in the August 2004 examination, more than three years after
17 Plaintiff's date last insured.⁴ (AR 112.) The fact that Plaintiff
18 had tender points in August 2004 has little if any bearing on whether
19 he had fibromyalgia more than three years earlier in June 2001. A
20

21 ³ "Self-reported impairment in short-term memory or
22 concentration severe enough to cause substantial reduction in previous
23 levels of occupational, educational, social, or personal activities;
24 sore throat; tender cervical or axillary lymph nodes; muscle pain;
25 multi-joint pain without joint swelling or redness; headaches of a new
type, pattern, or severity; unrefreshing sleep; and postexertional
malaise lasting more than 24 hours." SSR 99-2p at *2.

26 ⁴ The ALJ found and Plaintiff does not contest that his date
27 last insured was June 30, 2001. Accordingly, Plaintiff was required
28 to prove that he was disabled within the meaning of the Social
Security Act on or before that date. See 42 U.S.C. § 423(c); *Tidwell*
v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998).

1 treating physician's opinion may be rejected where it lacks
2 "supportive objective evidence" or "substantive medical findings" to
3 support its conclusion. *Batson v. Commissioner*, 359 F.3d 1190, 1195
4 (9th Cir. 2004). That certainly is the case here.

5 Second, as noted by the ALJ, Dr. Andersen failed to rule out
6 other causes before reaching the conclusion that Plaintiff suffered
7 from CFS. SSR 99-2p requires that a physician first rule out
8 alternative explanations for an individual's symptoms before
9 concluding that he suffers from Chronic Fatigue Syndrome. See SSR 99-
10 2p at *2.⁵

11 Third, Dr. Andersen's contemporaneous treatment records, which
12 suggest as early as October 30, 2000, and throughout the year that
13 followed that Plaintiff's condition was improving, do not provide "the
14 sort of description and recommendations one would expect to accompany
15 [the] finding that [Plaintiff] was totally disabled" as stated in Dr.
16 Andersen's August 5, 2004 letter. *Rollins v. Massanari*, 261 F.3d 853,
17 856 (9th Cir. 2001)(affirming ALJ's rejection of treating physician
18 opinion where findings indicated that claimant was not disabled); see
19 also *Johnson v. Shalala*, 60 F.3d 1428, 1432-33 (9th Cir. 1995)
20 (affirming rejection of treating physician's opinion, contained in
21 letter opinion of 1992, that claimant was disabled between 1981 and
22 1986, where letter was conclusory and inconsistent with physician's
23 own contemporaneous findings). In sum, Dr. Andersen's records are

24
25 ⁵ Signs include "palpably swollen or tender lymph nodes on
26 physical examination; nonexudative pharyngitis; persistent,
27 reproducible muscle tenderness on repeated examinations, including the
28 presence of positive tender points." SSR 99-2p at *3. Laboratory
findings include an elevated antibody count; an abnormal magnetic
resonance imaging brain scan; and neurally mediated hypotension. *Id.*

1 simply insufficient to support his bare assertion in 2004 that
2 Plaintiff was totally disabled as of 2000, and the ALJ did not err in
3 so finding.

4 Plaintiff contends that the ALJ was required to develop the
5 record further by recontacting Dr. Andersen, and points out that Dr.
6 Andersen invited such contact in his August 5, 2004 letter.⁶ (Joint
7 Stipulation at 5.) Plaintiff is incorrect. The regulations provide
8 that the Agency must recontact an applicant's treating physician only
9 where the evidence is inadequate to make a disability determination or
10 is ambiguous. See 20 C.F.R. §§ 404.1512(e), 416.912(e),
11 416.927(c)(3).⁷ Dr. Andersen's records were neither inadequate or
12 ambiguous. Dr. Andersen clearly set forth that he thought that
13 Plaintiff was disabled due to fibromyalgia. He also included all of
14 his treatment notes which informed his decision. The ALJ did not
15 reject Dr. Andersen's opinion because it was ambiguous or inadequate.

16
17 ⁶ In that letter, Dr. Andersen stated, "If further information
18 is needed in regard to Mr. Ammon'[s] disability, please feel free to
19 contact us here." (AR 148).

20 ⁷ 20 C.F.R. §§ 404.1512(e) and 416.912(e) provide:

21 When the evidence we receive from your treating physician or
22 psychologist or other medical source is inadequate for us to
23 determine whether you are disabled, we will need additional
24 information to reach a determination of a decision . . .

25 (1) . . . We will seek additional evidence or clarification from
26 your medical source when the report from your medical source
27 contains a conflict or ambiguity that must be resolved, the
28 report does not contain all the necessary information, or does
not appear to be based on medically acceptable clinical and
laboratory diagnostic techniques.

20 C.F.R. § 416.927(c)(3) provides that if the ALJ does not have
sufficient evidence to make a disability determination, he will "try
to obtain additional evidence" under the provisions just cited.

1 He rejected it because it was unsupported by Dr. Andersen's treatment
2 notes. Because the records were neither inadequate or ambiguous,
3 there was no need to recontact Dr. Andersen.

4 Finally, Plaintiff complains that the ALJ erred when he
5 determined at step two that Plaintiff did not have a medically
6 determinable impairment. (Joint Stipulation at 9-12.) Again, the
7 Court disagrees.

8 At step two, an ALJ must decide whether a claimant has a severe
9 impairment. A severe impairment is one that significantly limits a
10 claimant's ability to perform basic work-related activities. Step two
11 is intended to be a "de minimis screening device to dispose of
12 groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
13 1996)(citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)). However,
14 "regardless of how many symptoms an individual alleges or how genuine
15 the individual's complaints may appear to be, the existence of a
16 medically determinable physical or mental impairment cannot be
17 established in the absence of objective medical abnormalities; i.e.,
18 medical signs and laboratory findings." *Ukolov v. Barnhart*, 420 F.3d
19 1002, 1005 (9th Cir. 2005)(quoting SSR 96-4p)(affirming ALJ's finding
20 that claimant had failed to establish existence of severe impairment);
21 compare *Webb v. Barnhart*, 433 F.3d 683, 687-88 (9th Cir. 2005)
22 (reversing ALJ's finding that claimant lacked medically severe
23 impairment where medical record included "objective medical evidence
24 demonstrating" various impairments, including x-rays and adverse
25 medication side effects).

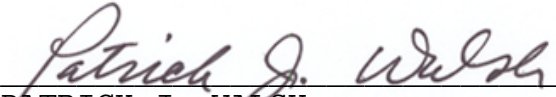
26 In reaching the conclusion that Plaintiff did not have a severe
27 impairment, the ALJ found that there was no evidence that Plaintiff's
28 symptoms could not have been treated with medication or that the

1 medication would have caused side effects that would interfere with
2 Plaintiff's ability to work. (AR 13.) The ALJ also found that
3 Plaintiff had produced no evidence to support his claim that he had
4 been unable to perform many daily activities at that time, and that
5 there was no evidence of hospitalization, pain clinic treatment,
6 emergency room admission, or psychiatric treatment of any kind. (AR
7 14.) The ALJ concluded at step two that Plaintiff did not have a
8 severe impairment because, under SSR 99-2p, "there was insufficient
9 evidence in the record to support the conclusion that [Plaintiff] has
10 severe [CFS] and intermittent fibromyalgia." (AR 14.)

11 As noted above, SSR 99-2p provides that the existence of CFS as a
12 "medically determinable impairment" may only be established after two
13 conditions have been satisfied. First, other possible causes for the
14 reported symptoms must be ruled out. Second, certain medical signs or
15 laboratory findings must be present. SSR 99-2p at *2. Plaintiff did
16 not establish either in this case. Dr. Andersen did not expressly
17 rule out other possible causes and did not perform the objective tests
18 on Plaintiff until more than four years after Plaintiff's eligibility
19 for benefits had expired. Thus, the ALJ's step two finding that
20 Plaintiff did not have a severe impairment is supported by substantial
21 evidence in the record and is affirmed.

22
23 IT IS SO ORDERED.

24 DATED: February 15 , 2008.

25
26 
27 PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

28 S:\PJW\Cases-Soc Sec\AMMONS, J 973\Memo_Opinion.wpd